SUPREME COURT, U.S.

No. 74-51

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In the Supreme Court of the United States

OCTOBER TERM, 1974.

EUGENE JOHN IZZI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Eugene John Izzi, your petitioner, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on June 4, 1974.

OPINION BELOW

The opinion of the Court below (Appendix A, infra P. App. 1).

JURISDICTION

The judgment of the court below (Appendix A, infra, p. App. 1) was entered June 4, 1974. A timely petition for rehearing was denied on July 8, 1974 (Appendix B, infra, p. App. 4). The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. App. § 1202 (a)(i)[1] in the light of the statutory construction of panel in the instant case is an unconstitutionally discriminatory statute?

2. Does a trial judge direct a verdict of guilty, when after a jury has deliberated 35 minutes, he gives them two additional charges, which he had refused to give before the defense counsel argued, and which charges completely destroyed the only theory of defense argued by defense counsel in summation?

3. Whether the Government can save a conviction resting on the two contested charges and the trial judge's failure to give a requested verdict of judgment of acquittal in light of the Bass and Harbin decisions which no interstate nexus whatsoever was proven by the Government?

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[1] 18 U.S.C. App. §1202 (a) (1)

Receipt, Possession or Transportation of Firearms—Persons liable; Penalties for Violation.

(a) Any person who . . .

(i) has been convicted by a Court of the United States or a State or any political subdivision thereof of a felony, and who receives, possesses, or transports in commerce or affecting commerce after the date of enactment of this act, any firearms shall be fined not more than $10,000 or imprisoned for not more than two years or both.

4. When the trial judge gives an instruction that instructs the jury that they can disregard both an element charged in the indictment and one of his previous instructions, does he deny the defendant due process of law?

5. Did a city conviction, for illegal possession of a firearm, bar a federal trial for the greater offense?

STATUTE INVOLVED

18 U.S.C. App. § 1202 (a) 1)

Receipt, Possession or Transportation of Firearms—Persons liable; Penalties for Violation.

(a) Any person who . . .

(1) has been convicted by a Court of the United States or a State or any political subdivision thereof of a felony, and who receives, possesses, or transports in commerce or affecting commerce after the date of enactment of this act, any firearms shall be fined not more than $10,000 or imprisoned for not more than two years or both.

STATEMENT OF FACTS

On February 22, 1973, your petitioner was arrested in Hammond, Indiana, by city police on charges of illegal possession of a firearm. He was fined in Municipal Court two days later upon being found guilty of illegal possession of a firearm. An agent of the Alcohol, Tobacco, Tax and Firearm Division of the Treasury Department interviewed petitioner which resulted in his indictment by a Federal Grand Jury.

Trial was held with the defense theory being shown in opening statement, cross examination and summation to be that while petitioner was a previously convicted felon in possession of the firearm, he, first, never had any connection with the firearm in Interstate Commerce whatsoever, and, second, did not even know that the firearm had ever been in Interstate Commerce.

The testimony showed that the weapon charge grew out of a police officer allegedly visually observing the weapon stuck in petitioner's waist band. Petitioner was never accused of having any connection with bringing the weapon across the state line nor receiving it from anyone who did, nor knowing that it had ever traveled in Interstate Commerce.

During trial of the case, no one ever connected petitioner in any way with Interstate Commerce nor with having knowledge the firearm had ever been in Commerce.

Evidence produced alleged that the defendant was a previously convicted felon and that the weapon had been purchased by a Billy Clanton in Atlanta, Georgia, while Clanton was a military policeman stationed in Atlanta, Georgia. Clanton was a Hammond area policeman at the time of petitioner's arrest.

The Government did not attempt to show whether the gun had been purchased a year previously, ten years previously, or 50 years previously. There was no showing when it crossed a state line whatsoever or when the gun was purchased in Atlanta.

It was testified to on cross-examination by the gun dealer that the defendant here was not the person who purchased the gun and that he did not know your petitioner.

At the close of the Government's evidence, defense counsel made a motion for a judgment of acquittal citing the *Bass* case from the U.S. Supreme Court and the *Harbin* case from this circuit and asserting that the Government failed to prove a prima facie case in that nowhere was any nexus between the defendant's possession of a firearm and Interstate Commerce and that his possession was wholly interstate. The motion was denied.

Defendant did not take the stand.

After the Defense rested its case without calling any witnesses, and the court's instructions were offered to defendant's counsel, the following occurred:

Neither the prosecution nor the defendant objected to any charges given prior to closing argument. The Prosecution had offered instructions eight and ten which were discussed in chambers at which time defense counsel objected to them being given, saying that they would destroy the entire theory of defense he intended to argue. After further discussions involving the trial judge, the Assistant U.S. Attorney and Defense Counsel, the trial judge stated the following.

The Court: Further indicates that it will give Government's 1, 2, 3, 4, will give 5 as modified, will refuse 6, will give Government's 7, will refuse Government's 8, will refuse Government's 9, and will refuse Government's 10 to which neither counsel made any objection.

The jury deliberated for 35 minutes during which time, they twice sent the Court notes asking questions about what proof was needed to show that the defendant had been involved in Interstate Commerce and if that element must be proven.

After the second note, the trial judge, (T-187), following a request by the Assistant United States Attorney, stated that he would then give the two additional charges which he had previously refused to give. The defense objected vigorously (T-184, 185, 186, 187, 188, and 189). The Court then remarked in an aside to the Prosecutor, "You may have bought yourself an appeal, but I am going to give the two additional instructions."

The instructions were as follows:

> No. 8.—The Government may meet its burden of proving a connection between Commerce and the receipt or possession of a firearm by a convicted felon if it is demonstrated that the firearm received or possessed by a convicted felon had previously traveled in Interstate Commerce.
>
> No. 10—It is not necessary that the Government prove that the Defendant knew of or participated in the alleged Interstate Commerce of the firearm.

The entire Defense argument was geared to the assertation that they would not deny petitioner had the gun nor that he was an ex-convict, but instead shot their entire arsenal to show only that the Government had not proven that the firearm was possessed by or connected to the defendant within any Interstate Commerce transaction.

Defendant even argued the Government's theory that defendant (T-164) did serve time in a South Carolina chain gang, relying on there being no Interstate nexus.

Defendant's counsel acknowledged the Government's contention that the policeman, Billy Clanton, had purchased the gun in another state.

On appeal, the court below, reviewing the evidence de nova, in an unpublished order (a true copy of which is attached hereto as Appendix A) decided as follows:

(1) That the commerce requirement of 18 U.S.C. 1201(a)(1) is satisfied by showing that the firearm received by a convicted felon had previously been transported in interstate commerce.

(2) That knowledge by the Defendant of the interstate movement is not required.

The panel cited two cases as supportive of this position. *U.S.* v. *Giannoni,* 472 F. 2d 136 (9th Cir. 1973); *U.S.* v. *Walker,* Slip Opinion No. 73-1246 (7th Cir. November 28, 1973). In each of those cases, especially *Giannoni,*[2] there existed a very tenuous and strained nexus of interstate shipment. In addition, the facts adduced at trial in both of the above named causes would obviate any inference that the Defendant possessed knowledge of the interstate transportation. In *U.S.* v. *Brown,* 472 F.2d 1181 (6th Cir. 1973), the Court in commenting on such a tenuous nexus of interstate shipment stated at page 1182 that: "The Court did not place any time limit on the previous movement, neither do we."[3]

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[2] In *U.S.* v. *Giannoi,* 472 F.2d 136 (9th Cir. 1973) an interstate commerce nexus of at least 13 years was found not to be too tenuous to negate federal jurisdiction over the charged offense.

[3] "The Court" referred to was the United States Supreme Court and *dicta* from its holding in *U.S.* v. *Bass,* 404 U.S. 336, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971) which the above court and the panel in the instant case cite as controlling.

REASONS FOR GRANTING THE WRIT

We have here a case where a verdict has been sustained on a theory that, although not raised at the trial level, becomes controlling as the theory did not arise until the Appeals Court ruled. They used their interpretation of the statute to uphold the conviction and going against issues 2, 3, 4 and 5.

The statute has created the class of felons and then through interpretation of various courts[4] has created a situation where mere arbitrary chance is determinative of the culpability under federal law of the various members of the defined class. The situation is most effectively illustrated by a hypothetical situation as follows:

> Two convicted felons are arrested in Chicago with firearms in their possession. Neither man knows whether his firearm has been transferred in interstate commerce. One of the guns had been transported in interstate commerce five years previously, while the other firearm never traveled in interstate commerce.

The law in the above hypothetical situation and in all the cited cases interpreting the *dicta* in *Bass* v. *U.S.*, 404 U.S. 336, 92 S. Ct. 515, 30 L.Ed 2d 488 (1971) have created a position that is constitutionally untenable. The statute, as interpreted and enforced, is clearly laying unequal hands on those who have committed intrinsically the same quality of an offense. Assuming that the holding of this panel and this Court along with the fourth, sixth, eighth and ninth

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[4] *U.S.* v. *Mancino*, ...F.2d ..... (8th Cir. 1973); *U.S.* v. *Mullins*, ... F.2d ..... (4th Cir. 1973).

circuit are correct in their evaluation of the holding in *Bass* then the subject statute is dually unconstitutional discrimatory, both in conception and in effectuation. The discrimination within the call is clearly invidious and arbitrary.

As early as 1886, the United States Supreme Court in *Yick Wo* v. *Hopkins,* 118 U.S. 356, 6 S. Ct. 1064, 30 L. E. 220 firmly established the principle that equal protection of the law is denied when state officials enforce a valid statute in a discrimatory fashion. Clearly then, equal protection guarantees against invidious discrimination between persons in similar circumstances. The law may not lay unequal hand on those who have committed intrinsically the same quality of offense. *Gaines* v. *Canada,* 305 U.S. 337, 83 L. Ed. 208, 59 S. Ct. 232; *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); *Jones* v. *State Board of Education of and for State of Tennessee,* 279 F. Supp. 190 (1968).

The mandate of the Supreme Court in *Yick Wo* v. *Hopkins,* was based on the Equal Protection Clause of the Fourteenth Amendment.[5] While the Fifth Amendment applicable to the Federal Government, exacts due process of law, as the Fourteenth demands of the states, the text of the Fifth omits an explicit guarantee of equal protection. However, the Supreme Court states as follows: "But the concepts of equal protection and due process both stemming from our American ideal of fairness, are not mutually exclusive," and while possibly they are not inexorably congruent, "discrimination may be so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe,* 347 U.S. 497, 74 S. Ct. 693, 98 L. E. 884 (1954).

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[5] "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

The Court in *Yick Wo* v. *Hopkins,* supra at 369, 1070, and 220 stated: "These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*" (Emphasis added) The Due Process Clause of the Fifth Amendment contains the same "pledge of the protection of equal laws." *Washington* v. *U.S.,* 401 F. 2d 915 (1968).

The proof of either an unconstitutionally discriminatory statute or the unconstitutional administration of a penal statute lend themselves to the same standard. The question to be considered is, "Whether there has been invidious and arbitrary discrimination against persons in similar circumstances?". *Skinner* v. *State of Oklahoma ex rel. Williamson,* supra; *Yick Wo* v. *Hopkins,* supra.

Therefore, it must be considered as a matter of statutory construction whether 18 U.S.C. 1202(a)(1) in its total operative enforcement works as invidious and arbitrary discrimination in its application. Under the interpretation now applied to the above statute by this and other courts, the discrimination within the created class is clearly invidious and arbitrary.

Going to the other issues, we first look at Question 2. Here,

As a further showing of a creation of a special class of persons which denies petitioner equal protection of the law, on August 1, 1974, former Vice-President Spiro T. Agnew was permitted by Rex. D. Davis, Director of the Federal Bureau of Alcohol, Tobacco and Firearms to "keep a gun despite his status as a convicted felon." Mr. Agnew was taken out of a class of people restricted from possession of guns which had at sometime crossed a state line. The allowance is further evidence that your petitioner here is placed in a special category of persons which violates the equal protection clause of the U. S. Constitution. It had also been established that Mr. Agnew's gun was not manufactured in Maryland where he resides and had therefore at sometime crossed a state line and been in Interstate Commerce, therefore further putting Mr. Izzi, your petitioner, in a special class of citizens even beyond other ex-convicts in expressly denying him equal protection of the

THE TRIAL JUDGE DIRECTED A VERDICT OF GUILTY IN GIVING THE TWO COMPLAINED OF INSTRUCTIONS AND SUBSTANTIAL ERROR RESULTED IN THAT:

A. THE JUDGE EXCEEDED HIS DISCRETION.

The jury was left with no choice but to bring in a verdict of guilty when they were told that it was not necessary that the Government prove that the defendant knew of or participated in the alleged Interstate Commerce of the firearm, and that the Government could meet its burden of proof simply by showing that the firearm previously at some time had traveled in Interstate Commerce.

The case that is now before this Honorable Court is one where the trial judge, defense counsel and the Assistant United States Attorney met in chambers prior to closing arguments to go over the charges as is customary. The Government Attorney offered the two complained of cited above instructions (T. p. 191-192) which were at first refused by the trial judge.

Defense counsel was allowed to argue his theory of defense believing that the instructons would not be given and knowing that nothing else in any previously given instructions could nullify his theory of defense and then believing that it would come down to whose argument was the most persuasive in showing that the Government had failed to prove an essential element of the indictment, to-wit: that the defendant KNOWINGLY (emphasis added) did receive, possess, and transport in Commerce or affecting Commerce a firearm which had been shipped and transported in Interstate Commerce from Atlanta, Georgia, to Hammond, Indiana.

The two above additional instructions were given over strenuous defense (T-187) objections.

The effect of Instructions 8 and 10 upon the minds of the jury actually in fact destroyed the only defense that had been argued to the jury by the defense counsel.

Fundamental fairness dictated that these additional instructions should not have been given since there was no way they could do anything else under the facts except to direct a verdict of guilty.

A judge may not direct a verdict of guilty. *Sparf & Hansen* v. *U.S.*, 156 U.S. 51, 105, 15 S. Ct. 173, 39 L. ed. 343, *U.S.* v. *Taylor*, 11 F. 450, *Atchison, T & S. F. Ry. Co.* v. *U.S.*, 7 Cir., 172 F. 194, 27 LRA N. 5756.

And what a judge cannot accomplish directly he may not accomplish by indirect means. *U.S.* v. *Gollin*, 3 Cir. 166 F. 2d 123.

A trial court may not shift the burden of proof from the prosecution to the defendants for this burden is the Government's alone to bear. The Court said in *Dillon* v. *U.S.*, 218 F. 2d 97, at page 99 that:

> "Great care should be observed in the exercise of judicial discretion to the end that no shifting of the burden placed upon the prosecution to prove guilt result in requiring to any degree or extent that defendant prove his innocence. The burden of proof must remain on the prosecution to establish guilt. The administration of justice is not a game of chess or of hide-and-seek. It is a search for truth and the application of the law to the true facts in order that substantial justice be done under the law."

THE INSTRUCTION SHIFTED THE BURDEN OF PROOF FROM THE GOVERNMENT TO THE DEFENDANT

This burden cannot be shifted and to do so is reversible error. *Iirsch* v. *United States*, 218 F. 2d 97.

The burden of proof in the case at bar was shifted from the Government to the defense by the two additional charges.

> "Great care should be observed in the exercise of judicial discretion to the end that no shifting of the burden placed on the prosecution to prove guilt results in requiring to any degree or extent that an accused prove his innocence. An instruction is erroneous which improperly deprives accused of his presumption of innocence and leads the jury to believe that the burden of proof is on him to prove his innocence", citing *State* v. *Walser*, 318 Mo. 833, 1 S.W. 2d 147, *State* v. *Sanford*, 317 Mo. 865, 297 S.W. 73.

By giving these two additional instructions after the defendant's theory of defense had been argued the jury was left with absoutely no way to acquit the defendant. The entire trial became a void. Upon the giving of the new instructions after the jury had deliberated and asked the question in writing whether defendant had had a personal connection with Interstate Commerce.

Two different notes were sent out (T. p. 180) requesting clarification on this point. When the first note came out the Judge (T. p. 181) declined to give any additional instructions.

A second note came a few minutes later (T. p. 182) at which time the judge gave the additional charges over vigorous objection by the defense.

THE GOVERNMENT FAILED TO CARRY ITS BURDEN OF PROOF IN THAT IT FAILED TO PROVE DEFENDANTS GUILTY BEYOND A REASONABLE DOUBT.

In order to establish the guilt of the defendants beyond a reasonable doubt, the following elements have to be proven by the Government:

The essential elements and the alleged facts of each of the elements of count one of the Indictment are as follows:

1. Whether or not Eugene John Izzi had previously been convicted of a felony?

2. Whether or not Mr. Izzi had in his possession a firearm?

3. Whether or not such possession, receipt and transportation was in Commerce or affecting Commerce.

4. Whether such possession, receipt and transportation was (emphasis added) KNOWINGLY done?

5. The Government's case against Mr. Izzi consisted of evidence which, at best, showed that which was conceded by the defense that he was a previously convicted felon and that he had been in possession of a pistol.

Taking the Government's evidence in a light most favorable to the Government, that evidence was only that the weapon had been purchased by someone else in another state and that it ended up in Indiana in petitioner's possession. There was never even a showing that the policeman had not given alone the weapon to Mr. Izzi. There was never a showing the pistol had been stolen or had been sold nor was there anything brought out at the trial that even attempted to connect the defendant to any Interstate Commerce transaction whatsoever.

Despite this Court's recent holding *U.S.* v. *Walker,* it should be argued here that in the case at bar that the *Bass* case in requiring a nexus has not said even in the dicta, that the *Walker* case and those in five other circuits were based on, that there is a nexus just by showing that someone at sometime possessed the gun in Interstate Commerce.

> In the *U.S.* v. *Bass,* 404 U.S. 336, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971), and this court in *U.S.* v. *Harbin,* 313 F. Supp. 50 (N.D. Ind. 1970), have held that the phrase "in or affecting commerce" contained in this section relating to a convicted felon receiving, possessing, or transporting in commerce or affecting commerce any firearm modifies the entire phrase "receives, possesses or transports" and not just the word "transports."

In *Bass* and in the *Harbin* case it was shown that one of the essential elements of the offense that must be proven by the Government was in the possession, receipt or transportation or transportation was in Commerce or affecting Commerce.

When Congress says possession, it must be speaking of the definition in Webster's Dictionary.

Webster's New Practical Dictionary published by G. & C. Merriam Co., Springfield, Mass., defines possession as "1. A possessing or being possessed; ownership. 2. Grammar. Designating or relating to the possessive, or a pronoun or construction in this case.—N. Grammar. The case of a noun or pronoun denoting ownership."

Obviously from the reading of this, the possession would have to be an immediate thing and it would be stretching beyond comprehension to construe such a statute to mean that the defendant in this case could have someone else's possession, receiving or transporting this weapon in Commerce or affecting Commerce tacked on to the wholly intrastate possession by your petitioner.

There are a whole line of cases both in this circuit and from the U.S. Supreme Court involving the hijacking of trucks or shipments from trucks.

The question has been worked out in most of those cases to ask, at what point in time does Interstate Commerce become invoked to allow federal law; and at what point in time, after a shipment comes to rest, is it no longer interstate but intrastate and therefore not subject to federal jurisdiction.

It is difficult to conceive of an instance in which a person could be convicted of possession of a firearm in Interstate Commerce or affecting Commerce unless he personally actually possessed that firearm under circumstances that actually involved Interstate Commerce during his own actual possession.

If all the Government needed to demonstrate is that the firearm received or possessed by a convicted felon previously traveled in Interstate Commerce, then Congress would have merely said that no formerly convicted felon could possess a firearm.

Congress to date certainly has not done that.

My reading of the *Bass* decision leaves no doubt that the U. S. Supreme Court feels that Congress has the power to prohibit all such possessions. However, had it been the intent of Congress to prohibit all such possession in this manner, then they would have passed that type of law and not one worded like the one here under which our defendant was charged.

Obviously, Congress intended all of those elements to be met which were contained in this indictment.

Therefore, knowledge was and is an essential element of the offense charged and that knowledge was never proven.

In the case of *United States* v. *Litberg,* 7th Cir. 175 F. 2d 20, the Court in citing *United States* v. *Russo,* 3 Cir. 23 F. 2d 420, 423 held that:

> Where knowledge was an essential element of the offense charged, it was held a judgment could not be sustained where the inference of lack of knowledge was as readily deducible as that of knowledge. See also Isbell v. United States, 8 Cir., 227 F. 788, 792; Pierce v. United States, 6 Cir., 115 F. 2d 399, 400; Hammond v. United States, 75 U.S. App. D.C. 395, 127 F. 2d 752, 753.
>
> The scienter of the offense charged is that the notes were passed or possessed "with intent to defraud and with knowledge that they were counterfeited," and in the absence of proof of such intent and knowledge a judgment of conviction cannot stand. United States v. Carll, 105 U.S. 611, 613, 26 L. Ed. 1135; United States v. Ruffino, 2 Cir., 67 F. 2d 440.
>
> The court gets to the crux of the matter when it cites United States v. Thatcher, 3 Cir., 131 F. 2d 1002, 1003. In this case the court reversing a conviction based on inferences stated: "To justify conviction of crime where the evidence relied upon is circumstantial in nature the evidence must be such as to exclude every reasonable hypothesis, but that of guilt.

In the case at bar the defendant's receipt and possession of the weapon was a wholly intrastate transaction and no interstate nexus was ever proven.

While there is a significant difference between the receipt offenses of Title IV and Title VII, Title IV is limited to the sending or receiving of firearms as part of an Intrastate transportation the Government produced no evidence here to connect the defendant to our interstate transaction.

Finally, here your defendant's possession of the firearm was shown by the facts not to be in commerce nor to have any effect on commerce.

The nexus required by the *Bass* rationale simply is not present. The definition of nexus in the intent of Congress could not possibly mean to stretch all the way to state demand that no convicted felon could possess any firearm that had ever been domiciled in another state. If this were the law, any defendant charged with receipt or possession of a weapon in any state other than the state wherein it was manufactured would be guilty since the firearm will necessarily have previously travelled in Interstate Commerce to get to the state where he was in possession.

If this case is allowed to stand, and such a theory becomes or remains law, there will be a federal encroachment on traditional local law enforcement that could destroy the "federal-state balance" which Justice Marshal indicated in the *Bass* case would not be recognized "absent a clearer statement of intention from Congress".

THE TRIAL JUDGE'S INSTRUCTION ORDERED THE JURY TO DISREGARD BOTH AN ELEMENT CHARGED IN THE INDICTMENT AND ONE OF HIS OWN PREVIOUS INSTRUCTIONS.

An essential ingredient in this indictment is that of knowledge.

In instruction 10, the judge charged:

> "It is not necessary that the Government prove that the defendant knew of or participated in the alleged Interstate Commerce of the firearm". That charge, under the facts of this case can be nothing less than the judge directing a verdict of guilty. The jury had no place to go except to find the defendant guilty and to do this had to completely and totally disregard an essential element of the indictment."

This instruction 10, being highly prejudiced and inflammatory, called for the jury to disregard counsel's entire theory of defense and jury summation. Further, it instructed the jury to disregard the judge's own original jury instruction (T. p. 171-172) that all elements of the indictment must be proven in telling them to disregard the indictment (T. p. 169) and (Appendix A of this brief) when he instructed them that no knowledge was necessary.

It is basic law in all federal jurisdictions that the prosecution must provide each and every allegation contained in an indictment. This case is distinguished from the *Walker* case in that the indictment here avers that defendant knowingly received this firearm.

The indictment is completely inconsistent with the charge given the jury by the Court and resulted in substantial error and amounted to a directed verdict of guilty.

Throughout all criminal trials, the burden rests upon the prosecution to prove the guilt of the accused, or, in other words, to prove each and every material element of the offense charged beyond a reasonable doubt. This burden never shifts, but remains upon it throughout the course of the trial. If the defendant does not rely on any separate, distinct, and independent fact, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof continues throughout on the prosecution, Indiana,—*Stewart* v. *State,* 44 Ind. 237.

Here, obviously, a material element of the offense charged is that of knowledge. If you did not have knowelge of the Interstate history of the pistol.

Even under the rationale in *U. S.* v. *Walker,* 14 CLR 2261, to charge the jury that the Government did not have to prove that defendant knew of the alleged Interstate Com-

merce of the firearm would constitute grave reversible error and dictate that this case should not be allowed to stand.

The prosecution has the burden of proving beyond a reasonable doubt the knowledge of a defendant *Piquett* v. *United States* (CA 7th) 81 F.2d 75, Cert. den. 298 U.S. 664, 80 L. ed. 1388, 56 S. Ct. 749.

In this case the judge's charge relieved the Prosecutor of his burden and instructed the jury in such a manner that they had no choice but not to hold the Prosecutor to his proof, therefore substantial error was committed in that defendant was convicted without due process of law.

The Supreme Court in the case of *In re Oliver,* 333 U.S. 257, 273, observed that:

> "A person's right to reasonable notice of charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence and these rights include, as a minimum, a right to examine the witnesses against him, and to be represented by counsel."

Here, the defendant had an indictment handed down against him and took this indictment to the attorney of his choice and asked for a defense.

The attorney went over the indictment, checked it against the applicable law and the facts in the case as outlined to him both by the client and through his own independent investigation. It is his educated guess at the conclusion of this study and investigation that a defense lay in holding the Government to their burden of proof on the original transaction on which the indictment was founded and make them prove each and every essential allegation contained therein.

Knowledge was and is an essential element of the offense.

When the judge instructed the jury they did not have to hold the Government to proving what it alleged in the indictment, he violated the due process of law clause in the constitution and denied the defendant a fair trial.

City conviction firearm possession barred the federal trial for a greater offense.

CITY CONVICTION BARRED THE FEDERAL TRIAL.

Whereas normally the difference between a federal firearm offense under 1202, (A)(1) appendix, and a city charge of possession of a firearm would not have the same standing as the theory on which a City Court conviction would bar a state trial for the greater offense on the "same transaction" or the "same transaction" or the "same evidence" test for double jeopardy, the facts in the case and the proof the trial judge required, if this case is allowed to stand on the other three points, would make the city conviction of the defendant here also bar this federal trial.

Here if the nexus to Interstate Commerce does not have to connect this defendant personally to Interstate Commerce as this writer believes it must, then the same proof required in city court, i.e., the mere possession of the weapon or established by the arresting officers would be the same for the federal trial. This is in light of the fact that the defense conceded at the outset that your petitioner was a previously convicted felon.

Here, the substance of our position is that the "same evidence" test must be utilized to determine the identity of the offenses, and that the use of that test will preclude a finding that the petitioner was twice placed in jeopardy for the same offense.

In determining the identity of the offenses for the purpose of establishing double jeopardy, two tests have been

utilized by the courts—the "same transaction" test and the "same evidence" test. See *Ashe* v. *Swenson,* 397 U.S. 436, 7 CrL 3020.

The essential purpose of the test is to prevent vexatious multiple prosecutions, and the test was created to solve the problems created by multiple violations of criminal statutes arising out of one transaction or episode. Although Justice Brennan, joined by Justice Douglas and Justice Marshall, has advocated the abandonment of the "same evidence" test in favor of the "same transaction" test, see *Ashe* v. *Swenson, Grubb* v. *Oklahoma,* 34 L. Ed. 2d 309, *Harris* v. *Washington,* 404 U.S. 55, 10 CrL 4071 (1971) (concurring opinion), it is clear that a majority of the members of the Supreme Court favor retention of the "same evidence" test and that it is the generally applied rule in the United States today.

The test is often stated in terms of whether the evidence that would have warranted a conviction on the first charge would also warrant a conviction on the second charge or in terms of whether different evidence is required to establish either charge. More correctly, as stated by Justice Sutherland in the case of *Blockburger* v. *U.S.,* 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306, 309 (1932), the rule is as follows: "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

CONCLUSION

The statute is unconstitutional on its face for the foregoing reason stated in discussion of the first issue, if the Supreme Court puts the same interpretation on the statute as was done by the Court of Appeals.

If that interpretation is not followed by this Honorable Court, then:

The Government failed to carry its burden of proof. The trial judge committed a gross abuse of discretion in giving the two complained of instructions under the circumstances outlined herein and in addition the instructions denied the defendant due compulsory process of law, directed a verdict against the defendant and shifted the burden of proof from the Government to the defendant. Further, the judge in effect told the jury that they did not have to hold the Government to proving its case and the trial itself should not have been held because it was barred by the city court conviction of this defendant on substantially the same exact charge.

This case should be reversed or the case should be reversed and remanded back to that same Honorable Court for a retrial.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted: May 24, 1974
Decided: June 4, 1974.

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-1086 *vs.*

EUGENE JOHN IZZI,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division.
No. 73 H CR 88
ALLEN SHARP, *Judge.*

ORDER

Defendant Eugene Izzi was indicted, tried by a jury and convicted of receiving, possessing and transporting a .44 magnum revolver in interstate commerce in violation of 18 U.S.C. §1202(a)(i).[1] Defendant has appealed and we affirm.

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[1] 18 U.S.C. App. §1202 (a) (i)

Receipt, Possession, or Transportation of Firearms—Persons liable; Penalties for violation.

(a) Any person who—

(i) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony, and who receives, possesses or transports in commerce or affecting commerce after the date of enactment of this act, any firearms shall be fined not more than $10,000 or in prison for not more than two years or both.

On February 22, 1972, two Hammond, Indiana policemen responded to a radio dispatch concerning a disturbance at a nearby hotel. As the officers approached the hotel they overheard a group of men conversing in a loud manner. The defendant who was among the group announced to his companions that he had a .44 caliber magnum revolver. After hearing this statement, the police arrested defendant on charges of illegal possession of a firearm. The revolver on defendant's person was found to contain three live rounds and two spent cartridges. Two days after his arrest, defendant was found guilty of illegal possession of a firearm in a city court. Subsequently, defendant was interviewed by a federal agent and explained that he had purchased the gun from an unidentified individual on the street. He explained that he was showing his new purchase when apprehended by the police. The gun was later determined to have been purchased in Atlanta, Georgia by one Billy Clanton on February 15, 1972. Defendant's indictment, conviction and this appeal followed.

Defendant contends that the government failed to prove a *prima facie* case. More precisely, defendant asserts that this was a wholly intrastate transaction and that no nexus between defendant's possession of the firearm and interstate commerce was proven. In so contending, defendant places substantial reliance on *United States* v. *Bass*, 404 U.S. 336 (1971). Additionally, defendant contends that the element of knowledge was never proven.

Having reviewed the record and taking the evidence, as we must, in a light most favorable to the government, we find that the government sustained its burden of proof under 18 U.S.C. §1202(a)(i) appendix. Moreover, we find defendant's reliance on *Bass* to be misplaced. The *Bass* case is distinguishable from the one before us in that the

indictment there did not allege nor did the government prove any interstate commerce. In so holding, the Supreme Court noted that the receipt offense is much broader in reach than the possession offense and that the government may meet its burden by demonstrating that the firearm received had previously traveled in interstate commerce. This court has decided that the commerce requirement of the receipt offense of 18 U.S.C. §1202(a)(1) is satisfied by showing that the firearm received by a convicted felon has previously been transported in interstate commerce. *United States* v. *Walker,* Slip Opinion No. 73-1246 (7th Cir. November 28, 1973). In *United States* v. *Gianonni,* 472 F.2d 136 (9th Cir. 1973), the Ninth Circuit held that the interstate commerce nexus of at least thirteen years prior to the robbery in which defendant obtained the firearm was sufficient to justify the assertion of federal jurisdiction over the offense of receiving a firearm by a convicted felon.

We see no merit in defendant's contention that the government must show knowledge of the interstate movement of the firearm. Conspicuous by its absence are cases cited in support of that proposition. In *United States* v. *Gianonni,* it is unlikely that the defendant had knowledge of the previous movement of the firearm. The interstate movement of the firearm is simply a jurisdictional act and the government need not prove knowledge of such jurisdictional facts. *United States* v. *Allegretti,* 340 F.2d 243 (7th Cir. 1964).

The defendant next contends that the district court erred in giving the two following supplemental instructions:

> No. 8—The Government may meet its burden of proving a connection between Commerce and the receipt or possession of a firearm by a convicted felon if it is

demonstrated that the firearm received or possessed by a convicted felon had previously traveled in Interstate Commerce.

No. 10—It is not necessary that the Government prove that the Defendant knew of or participated in the alleged Interstate Commerce of the firearm.

We see no merit in defendant's contention and for the reasons discussed above find that the instructions were a correct statement of the law. Accordingly, the district court cannot be said to have erred by instructing the jury as to the correct nature of the law. An instruction similar to the first supplemental instruction cited above was upheld in *United States* v. *Mullins*, 476 F.2d 664 (4th Cir. 1973).

Finally, defendant contends that his conviction for possession of a firearm in a city court barred the federal trial for the greater offense. We note at the outset that the record is void of any evidence that this issue was raised below. Assuming, *arguendo*, that the issue was raised below and is properly before this court, we find it to be without merit. The Supreme Court has held that a federal prosecution is not barred by a prior state prosecution. *Abbate* v. *United States*, 359 U.S. 187 (1959).

For the reasons stated above, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 8, 1974

Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 74-1086 *vs.*

EUGENE JOHN IZZI,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana,
Hammond Division.
(73 H CR 88)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no Judge in active service having requested a vote thereon, nor any Judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-51

EUGENE JOHN IZZI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. App. 1202 violates the due process clause; that the government failed to prove petitioner's knowledge of the statute's jurisdictional predicate; that the trial court erred by responding to a question from the jury with a supplemental instruction which, although a correct statement of the law, it had refused to give previously; and that a fine levied by a municipal court bars a subsequent federal prosecution.

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted, as a previously convicted felon, of receiving and possessing in commerce or affecting commerce a firearm, in violation of 18 U.S.C. App. 1202. He was sentenced to a term of two years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. A; 498 F. 2d 1403).

The evidence adduced at trial revealed that on February 22, 1973, two Hammond, Indiana, police officers responded to a radio call that there was a disturbance at a nearby hotel (T. 51-53). As they approached the hotel they observed four men standing outside talking in loud tones. One of the men, who was subsequently identified as petitioner, stated that he had a .44 magnum and pulled open his trench coat revealing "the hand grips of a large gun" (T. 54-55). Two days after this incident petitioner was convicted by a municipal court of illegal possession of a firearm (T. 161; Pet. App. 2).

Petitioner was subsequently interviewed by a federal agent, to whom he explained that he had purchased the weapon on the street just prior to his arrest (T. 88). The government introduced evidence that the pistol in question had been sold the preceding year in Atlanta, Georgia, to one Billy Clanton (T. 102-105) and that petitioner had previously been convicted of a felony in South Carolina (T. 113-115).

1. Petitioner contends that 18 U.S.C. App. 1202 violates the Constitution because it "arbitrarily" punishes a felon who possesses a firearm which has traveled in interstate commerce, but does not punish a felon who possesses a firearm which has not traveled in interstate commerce. This claim is insubstantial. The source of "unequal" treatment, if any, is the Constitution itself, which limits the power of Congress to those transactions affecting interstate commerce. In any event petitioner cannot complain that Congress has dealt with only a portion of the problem of the firearm abuse. Congress may proceed in a piecemeal fashion. See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 486-487.

2. Petitioner also contends (Pet. 14-21) that in order to satisfy the interstate commerce nexus requirement of the statute the government must show that he was aware of the weapon's interstate travel or that he possessed it during interstate travel. However, travel in commerce is only a jurisdictional predicate. It is not part of the *mens rea* of the offense. *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7). Petitioner was charged with receiving as well as possessing, and the government's evidence that the gun had been sold in Atlanta, Georgia, was uncontradicted (T.102-105). The jurisdictional predicate was thus clearly established. Cf. *United States* v. *Bass*, 404 U.S. 336, 350.

3. Petitioner contends that the trial court erred when it responded to a note from the jury with supplemental instructions which it had refused to give with the original instructions. The instructions given were correct statements of the law, and as the court below noted "the district court cannot be said to have erred by instructing the jury as to the correct nature of the law" (Pet. App. 4). Petitioner's counsel argued to the jury that the jurisdictional predicate of the offense had not been established (T. 162-163); the court's supplemental charge accurately answered a question from the jury which was apparently provoked by that argument.[1]

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[1]Petitioner cannot claim that his final argument was based on a belief that the court had accepted his assertion as to the interstate commerce requirements, because the court previously had rejected this reasoning in denying his motion for a directed verdict (T. 142-151).

4. Petitioner's final contention is that a "City Court conviction" (Pet. 21) and fine (T. 161) for possessing the weapon bars this federal prosecution. However, this Court has held that where the same act is both a federal and a state crime the offender may be prosecuted by either or both jurisdictions. *United States* v. *Lanza*, 260 U.S. 377; *Abbate* v. *United States*, 359 U.S. 187; see also *Bartkus* v. *Illinois*, 359 U.S. 121.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

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[2]Petitioner apparently contends that the "same evidence" test of *Blockburger* v. *United States*, 284 U.S. 299, would prohibit the federal prosecution. However, in the federal trial the government had to show that the pistol had previously traveled in interstate commerce and that the defendant was a felon. Neither was an element of the local offense of "possession of a firearm" (Pet. 21).